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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 263

C. D. WALKER, AS TRUSTEE IN BANKRUPTCY OF THE LAKE NURSERY COMPANY, BANKRUPT,

Petitioner,

vs.

L. MAXCY, INC., A CORPORATION UNDER THE LAWS OF FLORIDA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

CLAUDE L. GRAY,
Counsel for Petitioner.

C. P. DICKINSON,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 263

C. D. WALKER, AS TRUSTEE IN BANKRUPTCY OF THE LAKE NURSERY COMPANY, BANKRUPT,

Petitioner,

vs.

L. MAXCY, INC., A CORPORATION UNDER THE LAWS OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan F. Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

A.

Summary Statement of the Matter Involved.

The petitioner, Trustee in Bankruptcy of the Lake Nursery Company, under date of the 9th day of August, 1939, filed his report and verified petition for fixing and allowing costs in connection with the sale of the property of

the bankrupt, and the costs of preservation of said property during the pendency of the proceedings in Bankruptcy (R. 29-35) following the sale of said property free and clear of liens, which had been previously ordered in the Bankruptcy proceedings. The petition set forth the expenditures which had been made in connection with the care and preservation of the property and the services which had been performed by the officers of the Court in connection with said sale and showed that the sum of $12,181.35 of the common funds of the Bankrupt Estate had been used in preserving the property which inured to the benefit of the lien-holders. The petition further set forth that no part of the costs of the proceedings for the sale of the property had been paid, and that the petitioner had on hand only $78.90. The petition specifically prayed that the Court assess an amount against the lien-holder, L. Maxcy, Inc. (who was purchaser at the sale), equal to what would be a reasonable amount to charge for the foreclosure of the lien of L. Maxcy, Inc., and to further have fixed the costs of preservation, and to have the same assessed against the proceeds realized from the sale as a prior charge upon the funds so realized, and to have said sum so fixed paid into the Registry of the Court before the delivery of the deed to L. Maxcy, Inc. (the purchaser).

L. Maxcy, Inc. filed objections to the allowance of the petition (R. 38-43), but offered no testimony in support of the objections filed. At the hearing had on the 15th day of November, 1939, the testimony of the Trustee in Bankruptcy was received in support of his petition and he was duly cross-examined by the attorneys for L. Maxcy, Inc. (R. 43-96). The Trustee, under date of July 5th, 1939 had filed his report of sale showing that the property involved was purchased by L. Maxcy, Inc. for $52,500.00, subject to the confirmation of the Court, and further showing that the purchaser had stated at the time it made its bid that it

desired to pay said sum with its lien heretofore allowed, and subject to the terms and provisions of the order which had been made, providing for the fixing of the costs of preservation and of the proceedings, which said sum would have to be paid in cash in addition to the amount bid (R. 97-98) (pp. 8 of the order directing the sale specifically provided: "All questions of costs, fees and expenses arising in connection with this proceeding in bankruptcy are hereby reserved to be adjudicated and determined at the proper time and enforced by appropriate orders and proceedings") (R. 97).

On the 24th day of November, 1939 the Referee entered an order approving and confirming the sale of the property to L. Maxcy, Inc. and determining that the sum of $8,953.00 was a reasonable amount to be assessed and taxed against L. Maxcy, Inc. as costs of preservation of the property and costs of the proceedings had for the sale of said property, and finding that such costs were comparable to the cost which would have been assessed in a State Court proceeding for foreclosure of the mortgage involved. The order further provided for distribution of said amount to the Referee for his costs and fees, and to the Trustee for his award of compensation and attorneys' fees for the Trustee's attorneys. The order further provided for the payment of certain Trustee's certificates which had been issued and were held by the First State Bank of Eustis, amounting to $2500.00 (R. 99-102).

L. Maxcy, Inc. filed petition for review of the aforesaid order, and the District Judge, under date of April 22, 1940, entered an order reversing the order of the Referee dated November 24, 1939 (R. 107-108). In the meantime L. Maxcy, Inc., under date of December 27, 1939 filed a motion in the District Court setting up among other things that there was a considerable amount of ripe citrus fruit on the property in question, and after offering to pay the $8,953.00

into the Registry of the Court to abide a determination of the costs, moved the Court to confirm the sale to it and to require the delivery of a deed to it. The District Court granted said motion and the sum of $8,953.00 was paid into the Registry of the Court and the deed delivered (R. 104-107).

Subsequently, under date of June 5, 1940 the Referee, after hearing, determined that the sum of $5500.00 was a reasonable sum to be taxed and assessed against L. Maxcy, Inc. for the costs and expenses of conducting the sale of the property, as a part of the costs and expenses to be assessed against L. Maxcy, Inc., comparable to the reasonable costs, and not in excess of, the sum it would have cost to foreclose the lien of L. Maxcy, Inc. in a State Court (R. 112-113).

On the 14th day of June, 1940, L. Maxcy, Inc. filed a petition for review of said order (R. 114-115) and upon the same date certificate for review was filed by the Referee (R. 116-117).

No further proceedings were taken by L. Maxcy, Inc. and on the 18th day of July, 1940, the Trustee filed a motion to dismiss the petition and certificate of review as required by Local Rule 22 of the United States District Court, in and for the Southern District of Florida, and to have the order of the Referee affirmed. This rule in question provides that petitions for review shall within twenty (20) days from the filing of the certificate of review be called up for hearing before the Judge, otherwise such petition for review shall stand dismissed unless for cause shown the time for hearing shall be extended. L. Maxcy, Inc., after procuring its deed and after the certificate of review had been filed, waited for 34 days, 14 days more than the time prescribed by Local Rule 22, without calling the petition up for hearing and without obtaining an extension of time as required by the Rules.

On August 22, 1940, the District Judge, after hearing on the motion to dismiss petition for review, filed by the Trustee, entered an order granting said motion to dismiss and directing the distribution of the funds deposited in the Registry of the Court in accordance with the Referee's order of June 5, 1940, and affirmed the action of the Referee (R. 122-123).

On the 30th day of August, 1940, L. Maxcy, Inc. entered its appeal to the Circuit Court of Appeals for the Fifth Circuit at New Orleans (R. 123) appealing from the adverse ruling of the District Judge dismissing its petition for review.

The Circuit Court of Appeals under date of May 2, 1941, rendered an Opinion (R. 136-138) reversing the District Judge and directing that the sum of $500.00 and no more be assessed against L. Maxcy, Inc. as its proper share of the costs of the proceedings.

Under date of May 22nd, 1941, the Trustee in Bankruptcy filed petition for rehearing (R. 140-143) which said petition for rehearing the Circuit Court of Appeals denied under date of May 31st, 1941 (R. 144). Thereafter, under date of June 12, 1941, Motion was filed for order staying issuance of Mandate in the Circuit Court of Appeals, which motion was granted.

Precise Questions Involved for Determination.

1. WHERE A LOCAL RULE OF THE DISTRICT COURT PROVIDES THAT ALL PETITIONS FOR REVIEW OF A REFEREE'S ORDER IN BANKRUPTCY SHALL BE CALLED UP BY THE PETITIONER FOR HEARING BEFORE THE JUDGE WITHIN TWENTY DAYS FROM THE FILING OF THE CERTIFICATE OF REVIEW BY THE REFEREE, OTHERWISE SUCH PETITION FOR REVIEW SHOULD STAND DISMISSED, MAY A PARTY LITIGANT IGNORE THE RULE AND LATER AVAIL HIMSELF OF AN APPEAL?

2. WHERE A LIENHOLDER AVAILS ITSELF OF THE BENEFITS OF A SALE FREE AND CLEAR OF LIENS, AND THROUGH SAID PROCEEDINGS PROCURES TITLE TO THE PROPERTY INVOLVED BELONGING TO THE BANKRUPT ESTATE AND COVERED BY ITS

LIEN, SHOULD THE LIENHOLDER BE REQUIRED TO PAY THE REASONABLE COSTS OF THE PROCEEDINGS HAD FOR THE SALE OF SAID PROPERTY AS FIXED AND DETERMINED BY THE COURT?

3. ARE THE TRUSTEE IN BANKRUPTCY AND THE REFEREE WHO CONDUCT THE SALE FREE AND CLEAR OF LIENS OF PROPERTY BELONGING TO THE BANKRUPT ESTATE ENTITLED TO THEIR PRESCRIBED COMMISSIONS AND FEES UNDER THE BANKRUPTCY ACT WHERE THE LIENHOLDER PURCHASES THE PROPERTY WITH HIS LIEN AS A PART OF THE PURCHASE PRICE, AND IF SO, MAY SUCH FEES BE CHARGED TO THE LIENHOLDER WHERE THERE ARE NO FUNDS IN THE GENERAL ESTATE OUT OF WHICH SUCH FEES MAY BE PAID?

4. UNDER SECTION 48 OF THE BANKRUPTCY ACT (11 U. S. C. A. PP. 76) WHICH PROVIDES THAT THE TRUSTEE IS ENTITLED TO A COMMISSION "on all monies disbursed or turned over to any person, including lienholders" MAY A LIENHOLDER WHO UTILIZES THE AMOUNT OF HIS LIEN IN PURCHASING PROPERTY OF THE BANKRUPT ESTATE SOLD FREE AND CLEAR OF LIENS UNDER ORDER OF THE BANKRUPTCY COURT BE REQUIRED TO PAY THE TRUSTEES' COMMISSIONS AS FIXED BY THE BANKRUPTCY ACT ON THE AMOUNT OF THE LIEN ALLOWED BY THE BANKRUPTCY COURT AS PART OF THE PURCHASE PRICE?

5. (a) UNDER SECTION 2 (18) OF THE CHANDLER ACT, MAY A BANKRUPTCY COURT TAX AND ASSESS AGAINST A SECURITY HOLDER WHO REALIZES ON HIS SECURITY IN THE BANKRUPTCY PROCEEDINGS A PORTION OF THE COSTS AND EXPENSES INCIDENT TO THE PRESERVATION AND LIQUIDATION OF THE SECURITY INVOLVED?

(b) IF SO, IS THE SUM OF $5,500.00 A REASONABLE AMOUNT TO REQUIRE THE SECURITY HOLDER TO PAY WHERE THE PROPERTY INVOLVED CONSISTS OF A CITRUS GROVE WHICH REQUIRED CONSTANT CARE AND EXPENSE FOR ITS PRESERVATION BY THE BANKRUPTCY COURT FOR A PERIOD OF APPROXIMATELY THREE YEARS AT AN EXPENSE OF OVER $12,000.00 TO THE BANKRUPT ESTATE, AND WHERE THE SECURITY HOLDER REALIZES, IN ADDITION TO THE PROPERTY INVOLVED, A MATURED CITRUS CROP WHICH WAS GROWN ON THE PROPERTY BY THE TRUSTEE AT THE EXPENSE OF THE BANKRUPT ESTATE?

B.

Reasons Relied Upon for the Allowance of the Writ.

1.

The decision of said Circuit Court of Appeals has so far departed from the accepted and usual course of judicial

proceedings as to call for the exercise of the Supreme Court of the United States' power of supervision in this:

(a) That said Appellate Court arbitrarily fixed the sum of $500.00 as the amount to be assessed against the lienholder, notwithstanding the fact that the Referee and the District Judge, based on the evidence, had determined the sum of $5500.00 as a reasonable amount to be assessed against the lienholder.

(b) The amount of $500.00 fixed by the Appellate Court is insufficient to cover the statutory fees and allowances of the Referee, Trustee and officers of the Court as prescribed by Sections 40 and 48 of the Chandler Act to say nothing of the other expenses and costs of the preservation and liquidation of the security involved.

(c) The effect of the decision of the Appellate Court as rendered would make a Court of charity of the Bankruptcy Court which is inconsistent with the paramount exclusive jurisdiction which the Court held and exercised over the property in question, and such decision is probably in conflict with the applicable decisions of this Court governing the province and jurisdiction of a Court of Bankruptcy.

2.

The decision of the Appellate Court failed to give effect to Rule 22 of the District Court Rules which requires a petition for review to be called up for hearing within twenty (20) days from the filing of the certificate of review by the Referee, and further provides that such petition for review should stand dismissed unless so called up.

The decision, therefore, is in conflict with the case of *Williamson* v. *Leith, et al.*, 36 F. (2d) 643 (C. C. A. 5th) interpreting said Local Rule.

The decision of the Appellate Court is also probably in conflict with decisions of Circuit Courts of Appeals on

similar rules, to-wit: *In re David,* 33 F. (2d) 748 (C. C. A. 3rd) which case holds that a similar rule supplemental to General Order 27 is exclusive.

The decision of the Appellate Court is also probably in conflict with the decision in the case of *Patents Process, Inc., et al.,* v. *Durst, et al.,* 69 F. (2d) 283 (C. C. A. 9th).

3.

The Appellate Court has decided an important question of Federal Law which has not been but which should be settled by the Supreme Court of the United States in this:

(a) Where the lienholder who has availed himself of the procedure in a Bankruptcy Court for the recovery of its debt by the sale free and clear of liens in the Bankruptcy Court and has accepted the benefits of the procedure of the Bankruptcy Court, should the lienholder be required to pay the reasonable costs of said proceedings for liquidation and preservation of the security involved?

(b) Whether the Referee's and Trustee's commissions as prescribed by the Chandler Act should be paid by the lienholder who avails himself of the procedure of the Bankruptcy Court where there are no funds in the general estate to pay the same?

(c) Whether a Bankruptcy Court may tax and assess against the lienholder the costs and expenses of conducting a sale free and clear of liens comparable to the costs of foreclosure in the State Court where the lienholder avails himself of the sale free and clear of liens and there are no funds in the general estate to pay the costs of such proceedings?

Virginia Securities Corporation v. *Patrick Orchards, Inc.,* 20 F. (2d) 78 (C. C. A. 4th Cir.)

4.

The decision of the Appellate Court vitally affects not only the local referee and trustee in question but the principles involved affect generally the Bankruptcy Courts, and to allow the decision to stand, particularly without clarification, would jeopardize the interests of the officials of the Bankruptcy Courts in general throughout the United States, and the decision of the Appellate Court interpreting the Chandler Act probably violates and is in contravention of the Act itself insofar as it prescribes fees and commissions of the referee and trustee.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and forward to this Court a full and complete transcript of the record in the proceeding in said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 9698 In Bankruptcy, *L. Maxcy, Inc., a Corporation under the laws of Florida, Appellant,* v. *C. D. Walker, as Trustee in Bankruptcy of the Bankrupt Estate of Lake Nursery Company, a Bankrupt, Appellee,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such further relief as this Court may deem proper.

Dated, Orlando, Florida, July 9, A. D. 1941.

C. D. WALKER,
As Trustee in Bankruptcy of
Lake Nursery Company, Bankrupt.
By CLAUDE L. GRAY,
Attorney for Petitioner.

C. P. DICKINSON,
CLAUDE L. GRAY,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 263

C. D. WALKER, AS TRUSTEE IN BANKRUPTCY OF THE LAKE NURSERY COMPANY, BANKRUPT,

Petitioner,

v.

L. MAXCY, INC., A CORPORATION UNDER THE LAWS OF FLORIDA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The Opinion of the Circuit Court of Appeals for the Fifth Circuit will be found in 119 F. (2d) Pages 535-536. This Opinion reversed the decree of the District Court found in the Record at Pages 122-123.

II.

Jurisdiction.

1. Jurisdiction is invoked under Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat.

938, 28 U. S. C. A., Section 347, and under Section 24 (c) of the Bankruptcy Act as amended June 22, 1938, which said Act vests in the Supreme Court of the United States jurisdiction to review judgments, decrees and orders of the Circuit Courts of Appeals of the United States (July 1, 1898, 30 Stat. at L. 544, chap. 541, p. 24; May 27, 1926, 44 Stat. at L. 662, chap. 406, p. 9; June 22, 1938, 52 Stat. at L. 802, chap. 575, p. 1 (11 U. S. C. A. p. 47).)

Jurisdiction of the Circuit Court of Appeals is founded on U. S. Judicial Code Section 128, as amended by Act of February 13, 1925 (43 Stat. 936, 937) and by Act of May 27, 1926 (44 Stat. 664), and Section 24 (a) of the Bankruptcy Act as amended June 22, 1938 (11 U. S. C. A. 47).

2. The date of the judgment to be reviewed is May 2, 1941. Petition for rehearing was denied May 31, 1941.

3. The nature of the case, and the fact that the rulings were such as to bring this case within the jurisdictional provisions relied on, are fully disclosed in the petition for writ of certiorari, under Subdivisions A and B respectively. Hence in the interest of brevity are not here repeated.

4. The following are the cases believed to sustain the jurisdiction:

Buffum v. *Barceloux Co.*, 289 U. S. 227, 77 L. Ed. 1140, 53 S. Ct. 539;

Gross v. *Irving Trust Co.*, 289 U. S. 432, 53 S. Ct. 605, 77 L. Ed. 1243, 90 A. L. R. 1215;

Adair v. *Bank of America Nat. T. & Sav. Asso.*, 82 L. Ed. 889, 58 S. Ct. 594, 303 U. S. 350-362;

Wright v. *Vinton Branch of the Mountain Trust Bank of Roanoke, Virginia, et al.*, 300 U. S. 440-470, 81 L. Ed. 736;

Van Huffel v. *Harkelrode*, 284 U. S. 225, 227, 76 L. Ed. 256, 258, 52 S. Ct. 115, 78 A. L. R. 453, 18 Am. Bankr. Rep. (N. S.) 730;

Bronx Brass Foundry v. *Irving Trust Co.*, 297 U. S. 230, 232, 56 S. Ct. 451, 80 L. Ed. 657;

Duparquet Huot & Moneuse Co. v. *Evans*, 297 U. S. 216, 217, 56 S. Ct. 412, 80 L. Ed. 591;

Ivanhoe Building & Loan Ass'n. v. *Orr*, 295 U. S. 243, 247, 55 S. Ct. 685, 79 L. Ed. 1419;

Lerner v. *First Wisconsin National Bank of Milwaukee*, 294 U. S. 116, 119, 55 S. Ct. 360, 79 L. Ed. 796;

Schumacher v. *Beeler*, 293 U. S. 367, 371, 377, 55 S. Ct. 230, 79 L. Ed. 433;

Stephen Callaghan, et al. v. *Reconstruction Finance Corp.*, 297 U. S. 464-471, 80 L. Ed. 804, 56 S. Ct. 519.

III.

Statement of the Case.

The statement of the case is fully set forth in the petition for certiorari, and for the sake of brevity, will be omitted here.

IV.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In reversing the District Court in that the District Court had upheld its Local Rule 22 which provides that a petition for review must be called up before the Judge within twenty (20) days from the filing of the certificate of review, otherwise it should stand dismissed, and thus allowed a party litigant to ignore the Rules and later perfect an appeal.

2. The Circuit Court of Appeals erred in holding that a lienholder who had availed itself of the benefits of a sale free and clear of liens, and through said proceedings had procured title to the property involved belonging to the

bankrupt estate and covered by its lien, should not be required to pay the reasonable costs of the proceedings had for the sale of said property and the preservation costs thereof as fixed and determined by the Trial Court.

3. The Circuit Court of Appeals erred in failing and refusing to hold that the Referee and Trustee were entitled to receive their fees and commissions as prescribed by the Bankruptcy Act where the lienholder purchases property sold free and clear of liens in the Bankruptcy Court and pays as a part of the purchase price with his lien established in the bankruptcy proceedings where there are no funds in the general estate out of which said fees may be paid.

4. The Circuit Court of Appeals erred in failing and refusing to give proper effect to Section 48 of the Bankruptcy Act (11 U. S. C. A. 76) which provides that the trustee is entitled to a commission "on all monies disbursed or turned over to any person, including lienholders" in that it refused to allow and grant to the trustee his full commissions as prescribed by said Act.

5. The Circuit Court of Appeals erred in refusing and failing to give the proper interpretation to Section 2 (18) of the Chandler Act which provides that the Bankruptcy Court may tax and assess costs and expenses against the unsuccessful, as well as the successful party to a proceeding in bankruptcy.

6. The Circuit Court of Appeals erred in reversing the Referee and District Judge who had held that the sum of $5,500.00 was a reasonable amount to require the security holder to contribute to the costs of the proceedings where the property involved consisted of a citrus grove which had required constant care and expense for its preservation for a period of approximately three years at an expense of

over $12,000.00 to the bankrupt estate, and where the security holder realized in addition to the benefits accruing from the sale itself, a matured citrus crop which was grown on the property by the Trustee at the expense of the bankrupt estate and was not covered by the lien of the security holder.

7. The Circuit Court of Appeals erred in not ordering that the outstanding Trustee's certificates in the sum of $2,635.00 be paid out of the funds deposited by the lienholder where the lienholder procured, as a result of the proceedings, a matured citrus crop not covered by its lien but which was impressed with the lien of the certificates in question, the effect of which was to defeat and allow to go unpaid the obligations of the Bankruptcy Court.

8. The Circuit Court of Appeals erred in holding that the sum of $500.00 was a reasonable amount to assess the lienor for the costs of the proceedings to include all of the benefits which had been derived from the sale, upkeep, preservation costs, statutory fees and commissions of the officers of the court and other expenses involved.

9. The Circuit Court of Appeals erred in refusing to give effect to the holding of the Referee and the District Judge, based on the evidence submitted, that the sum of $5,500.00 was a reasonable sum comparable to and not in excess of the amount it would have cost the lienor to foreclose its mortgage in the State Court.

10. The Circuit Court of Appeals erred in holding that the lienor was entitled to the benefits of the sale had in the Bankruptcy Court free and clear of liens without requiring it to pay the costs of said proceedings as prescribed by the Bankruptcy Act and which would have been required in any other forum rendering similar services.

V.

ARGUMENT.

Summary of the Argument.

A. May a party litigant ignore a local rule of the District Court which provides that all petitions for review of a Referee's order in Bankruptcy shall be called up by the petitioner for hearing before the Judge within twenty (20) days from the filing of the certificate of review by the Referee, and which provides as a consequence for such failure that the petition for review should stand dismissed, and after failure to observe such rule later avail himself of his rights to an appeal?

The District Judge upheld the ruling and dismissed the petition for review. The Circuit Court of Appeals held to the contrary.

B. A lienholder who avails itself of the benefits of a sale free and clear of liens, and through said proceedings procures title to the property involved belonging to the bankrupt estate and covered by its lien, should be required to pay the reasonable costs of the proceedings had for the sale of said property as fixed and determined by the court.

C. The Trustee in Bankruptcy and the Referee who conduct the sale free and clear of liens of property belonging to the bankrupt estate are entitled to their prescribed commissions and fees under the Bankruptcy Act where the lienholder purchases the property with his lien as a part of the purchase price, and such fees should be charged to the lienholder where there are no funds in the general estate out of which such fees can be paid.

D. Under Section 48 of the Bankruptcy Act (11 U. S. C. A. p. 76) which provides that the Trustee is entitled to a commission "on all monies disbursed or turned over to any

person, including lienholders", a lienholder who utilizes the amount of his lien in purchasing property of the bankrupt estate sold free and clear of liens under order of the Bankruptcy court should be required to pay the Trustee's commissions as fixed by the Bankruptcy Act on the amount of the lien allowed by the Bankruptcy Court as part of the purchase price.

E. (a) Under Section 2 (18) of the Chandler Act, a Bankruptcy Court may tax and assess against a security holder who realizes on his security in the bankruptcy proceedings a portion of the costs and expenses incident to the preservation and liquidation of the security involved.

(b) The sum of $5,500.00 is a reasonable amount to require the security holder to pay where the property involved consists of a citrus grove which required constant care and expense for its preservation by the Bankruptcy Court for a period of approximately three years at an expense of over $12,000.00 to the bankrupt estate, and where the security holder realizes, in addition to the property involved, a matured citrus crop which was grown on the property by the Trustee at the expense of the bankrupt estate.

F. A Bankruptcy Court may tax and assess against the lienholder who avails himself of a sale free and clear of liens in bankruptcy proceedings, the costs and expenses of conducting the sale comparable to the costs of foreclosure in a State court, there being no funds in the general estate to pay the costs of such proceedings.

G. The Referee's findings of fact, confirmed by the District Judge, should not be reversed on appeal by the Circuit Court of Appeals when such findings are based upon the testimony of witnesses and are consistent with the evidence submitted.

A.

May a party litigant ignore a local rule of the District Court which provides that all petitions for review of a referee's order in bankruptcy shall be called up by the petitioner for hearing before the judge within twenty (20) days from the filing of the certificate of review by the referee, and which provides as a consequence for such failure that the petition for review should stand dismissed, and after failure to observe such rule later avail himself of his rights to an appeal?

Local Rule 22 of the Bankruptcy Rules prescribed for the guidance of procedure in the Southern District of Florida provides as follows:

> "Rule 22. Petition for Review.—All petitions for review of referee's orders in bankruptcy shall be filed with the referee within 10 days from the making of the order sought to be reviewed, and all such petitions shall, within 20 days from the filing of the certificate of review of the referee, be called up by the petitioner for hearing before the judge, otherwise such petition for review shall stand dismissed, unless for cause shown the time for hearing shall be extended".

The Referee's certificate of review was filed June 14, 1940 (R. 116-117). No effort at all was made to set the petition down for hearing, and the Trustee filed motion to dismiss the petition for review for failure to comply with the Rule under date of July 18, 1940 (R. 117-119). The District Judge granted the motion at a hearing had thereon on the 20th day of August, 1940 (R. 122-123).

The ruling of the District Court was in accord with the case of *Williamson* v. *Leith, et al.*, 36 F. (2d) 643 (C. C. A. 5th), when this same rule was before the Circuit Court of Appeals for the Fifth Circuit.

The ruling is also in accord with a decision of the Third Circuit, to-wit: *In re David*, 33 F. (2d) 748 (C. C. A. 3rd), in which case the Court held:

> "Should a person fail to observe the rule—which is what happened here—he will of course forfeit the advantage which, by observing it, the rule affords him. Of this advantage he cannot later avail himself by a writ of certiorari, appeal or other indirect process, for the method of reviewing an order of a referee, prescribed by General Order 27 and the supplemental rule of the district court is exclusive."

It is also in accord with *Roberts Auto & Radio Supply Co.* v. *Dattle*, 44 F. (2d) 159 (C. C. A. 3rd).

The ruling of the District Court is also in accord with a decision of the Ninth Circuit, to-wit: *Patents Process, Inc., et al.* v. *Durst, et al.*, 69 F. (2d) 283 (C. C. A. 9th).

The District Courts generally uphold similar local rules:

In re Publix Enterprises, Inc., 7 Fed. Supp. 722 (S. D. N. Y.);

In re Parent, 30 Fed. Supp. 943 (D. C. New Hampshire);

In re Barta, 8 Fed. Supp. 84 (N. D. California).

The particular rule in question has not been passed on by the Supreme Court of the United States so far as we have been able to ascertain. However, the Circuit Courts of Appeal and the District Courts generally recognize the efficacy of similar supplemental rules to General Order 27, and the cited cases uphold the contention that the rule is exclusive and must be followed, otherwise the right to appeal is waived. Other cases hold that the application for extension of time must be made before the time specified has expired, otherwise the application made after the time has expired, if granted, would be the arbitrary setting of a new date.

Applying the principles enunciated in the foregoing cases, the Referee's order taxing $5,500.00 as the costs against L. Maxcy, Inc. had become final, and to extend the time further in violation of Rule 22 of the District Court amounts to an arbitrary fixing of a new date, rather than the extending of the time since L. Maxcy, Inc. had waited for fourteen (14) days beyond the time specified in the Rule.

Certainly there is no reason why L. Maxcy, Inc. should have been allowed additional time to appeal as was held by the Circuit Court of Appeals. We submit that the District Judge was correct in his decision interpreting the local rule, and that the Circuit Court of Appeals clearly erred in failing to affirm the action of the District Court which had affirmed the Referee.

It will be observed that L. Maxcy, Inc. took no appeal from the previous order of the District Judge entered on the 22nd day of April, 1940 (R. 107-111), which order directed the Referee to fix and determine the costs in accordance with the Opinion of the court and the order so entered. It is our position that this order of April 22nd, 1940 had become final under authority of *Patents Process, Inc., et al.,* v. *Durst, et al.,* 69 F. (2d), 283 (C. C. A. 9th).

In view of the apparent conflict in the holdings of the Circuit Court of Appeals for the Fifth Circuit, and in view of the fact that the holding in the instant case is in conflict with the holdings in other circuits, this situation should unquestionably be clarified.

B.

Where a lienholder avails itself of the benefits of a sale free and clear of liens, and through said proceedings procures title to the property involved belonging to the bankrupt estate and covered by its lien, should the lienholder be required to pay the reasonable costs of the proceedings had for the sale of said property as fixed and determined by the court?

It will be noted that the lienor, by motion filed (R. 102), asked that the sale to it be confirmed and that the trustee be directed to execute a deed to it. This motion recited that the sale had been made subject to the payment of costs, allowances and expenses that might be lawfully assessed against the lienor. Pursuant to this motion, order was entered directing the Trustee to deliver deed to L. Maxcy, Inc., and the sale was confirmed on motion to the lienor and the sum of $8,953.00 was deposited in the registry of the court to abide the final fixing of costs and expenses. It will be further noted that the lienor recited the existence of a ripe citrus crop which it procured by virtue of the confirmation, and which citrus crop was not covered by the lien of L. Maxcy, Inc., but had been produced at the expense of the bankrupt estate.

Under Florida law a mortgage holder has no title but must foreclose its security to obtain title. The position of the trustee is that the opinion of the Circuit Court of Appeals rendered herein is in conflict with the holding in the case of *Virginia Securities Corporation* v. *Patrick Orchards, Inc.*, 20 F. (2d) 78 (C. C. A. 4th), which was a case involving the sale free and clear of liens and the preservation costs incurred in an apple orchard where the Fourth Circuit Court of Appeals held:

> "Where lien creditor avails himself of instrumentalities of bankruptcy court in enforcement of his lien,

proceeds of property on which lien exists may be charged with expenses necessary in enforcement of lien, as well as in preservation of property."

Citing in support of this ruling, the following cases:

In re Barber (D. C.), 97 Fed. 547;

In re Torchia (D. C.), 185 Fed. 576; *Id.* (C. C. A.), 188 Fed. 207;

In re Chambersburg (D. C.), 190 Fed. 411;

In re West (D. C)., 232 Fed. 903;

In re Rauch (D. C.), 226 Fed. 982; *The Bethulia* (D. C.), 200 Fed. 879; *Gugel* v. *Bank* (C. C. A.), 239 Fed. 676.

It is therefore submitted that the Circuit Court of Appeals for the Fifth Circuit is out of line with the Fourth Circuit and with other circuits as well on this question.

C.

Are the trustee in bankruptcy and the referee who conduct the sale free and clear of liens of property belonging to the bankrupt estate entitled to their prescribed commissions and fees under the Bankruptcy Act where the lienholder purchases the property with his lien as a part of the purchase price, and if so, may such fees be charged to the lienholder where there are no funds in the general estate out of which such fees may be paid?

The foregoing question was answered by the Circuit Court of Appeals in the negative for the reason that the amount which was arbitrarily fixed by the Circuit Court of Appeals is insufficient to pay the statutory fees of the trustee and the referee as prescribed by the Chandler Act, without taking into consideration other costs and expenses incident to the sale, such as advertising, costs of abstract, and the costs of the proceedings, such as taking the testi-

mony on the issues involved between the lienors as to the respective validity and priority of their liens.

Simple calculation will reveal that if the trustee were entitled to the prescribed commissions on the sale, the amount due him for normal administration would be in excess of $500.00, and the referee would also be entitled to 1% of the purchase price of $52,500.00. The claim had been allowed in bankruptcy and was a debt secured by a lien. Therefore, the referee was entitled to his commission of 1%. The debtor realized this amount on the claim in bankruptcy and accordingly the referee's fees were taxable against the funds. This at least should be the holding under authority of *In re Huggins Co.*, 179 Fed. 490, 29 L. R. A. (N. S.) 737, 24 A. B. R. 715 (C. C. A. Mo.). The same effect, see *Varney* v. *Harlow*, 210 Fed. 824, 31 A. B. R. 339 (C. C. A. Va.).

In this connection, it is stated in Volume 6, Remington on Bankruptcy, 4th Edition, page 284:

> "The commissions of referees have never been computed upon any other sums than 'those disbursed to creditors.' And, lienholders may or may not be creditors. If they happen to be creditors and money is disbursed to them, then the referee is entitled to commissions upon such money, the fact of being lienholders not detracting from the attribute of being also creditors. Trustees and receivers, however, by the Amendment of 1910 were given commissions not only on amounts disbursed to creditors, whether lienholders or not, but upon amounts disbursed to any other person, including lienholders who were not creditors. This was the meaning of the framers of this amendment and this is the clear meaning of the section itself."

We do not find that the Supreme Court of the United States has passed on this question but there is apparent need for clarification because of the inconsistent holding in the instant case as compared with the cited cases, and under

the terms of the act it is submitted that the ruling of the Fifth Circuit Court of Appeals is in error.

D.

Under Section 48 of the Bankruptcy Act (11 U. S. C. A. p. 76) which provides that the trustee is entitled to a commission "on all monies disbursed or turned over to any person, including lienholders" **may a lienholder who utilizes the amount of his lien in purchasing property of the bankrupt estate sold free and clear of liens under order of the Bankruptcy Court be required to pay the trustee's commissions as fixed by the Bankruptcy Act on the amount of the lien allowed by the Bankruptcy Court as part of the purchase price?**

The Circuit Court of Appeals in the instant case makes no provision whatever for the referee's and trustee's commissions as prescribed by the Chandler Act. Certainly the sum of $500.00 is inadequate to take care of the trustee and the referee. Under Section 40 of the Chandler Act, the trustee was entitled to his commission for normal administration. This would have amounted to more than $500.00, and the referee an approximate similar sum, so the fees fixed by the Circuit Court of Appeals were insufficient to provide any funds whatsoever for the trustee.

In Volume 6, Remington on Bankruptcy, Fourth Edition, p. 2743, the statement is made:

> "2743. Referee's Commissions Where Creditor Purchases and Applies Dividend on Price.—Also, where a creditor buys in the property and applies his dividends in part payment therefor, the referee is entitled to commissions on the dividends so applied."

Citing in support thereof the case of:

> Morse Iron Works & Dry Dock Co., 154 F. 214, 18 A. B. R. 846 (D. C. N. Y.).

This particular question does not seem to have been passed on by the Circuit Court of Appeals other than in the instant case. We submit that the Circuit Court of Appeals for the Fifth Circuit in this respect is clearly in error.

E.

Under Section 2 (18) of the Chandler Act, may a Bankruptcy Court tax and assess against a security holder who realizes on his security in the bankruptcy proceedings a portion of the costs and expenses incident to the preservation and liquidation of the security involved?

Section 2 (18) of the Chandler Act is as follows:

> "(18) Tax costs and render judgments therefor against the unsuccessful party, against the successful party for cause, in part against each of the parties, and against estates, in proceedings under this Act;"

The foregoing cited portion of the Chandler Act is slightly different from the similar provision in the old Act in that the words in the old Act were limited to costs "in proceedings in bankruptcy", whereas under the new Act the words were used "in proceedings under this Act".

The particular question does not appear to have been passed on by the Supreme Court, but even in the absence of the specific authority granted by the terms of the original Act or of the Chandler Act, it is our position that the Bankruptcy Court, under its broad general equity powers could tax and assess costs of the proceedings which inured to the benefit of the lienor, and for the liquidation and preservation expenses incident to enabling the lienor to realize upon his debt and security. Certainly this is the holding of *Virginia Securities Corporation* v. *Patrick Orchards, Inc.*, 20 F. (2d) 78 (C. C. A. 4th Cir.), which case is cited by the Supreme Court with approval in the case of *Adair* v. *Bank of America Nat. T. & Sav. Asso.*, 82 L. Ed. 889, 58

S. Ct. 594, 303 U. S. 350-362. It is not contended that any charges should or could be made against the lienor for general administration. However, as was pointed out in the *Patrick* case, the fees and allowances should be made on the basis of services rendered in the administration of the lien property, and in the cited case, the Court said:

> "* * * the lienholder should be charged with the reasonable costs of such proceedings in the bankruptcy court as are appropriate to foreclosing the lien and selling the incumbered property."

As was pointed out by Mr. Justice Reed in the *Adair* case, *supra:*

> "* * * and the cost of protecting a fund in court is everywhere recognized as a dominant charge on that fund."

It is submitted that the contrarity of opinion existing as between the Fourth Circuit Court of Appeals' decision in the *Patrick* case and in the instant case is sufficient basis alone to grant the certiorari, and it is further submitted that the holding of the Fourth Circuit is the better view.

F.

Is the sum of $5,500.00 a reasonable amount to require the security holder to pay where the property involved consists of a citrus grove which required constant care and expense for its preservation by the Bankruptcy Court for a period of approximately three years at an expense of over $12,000.00 to the bankrupt estate, and where the security holder realizes, in addition to the property involved, a matured citrus crop which was grown on the property by the trustee at the expense of the bankrupt estate?

The Referee and the District Judge answered the foregoing question in the affirmative and based on the testi-

mony found that the sum of $5,500.00 was a reasonable amount to require the security holder to pay under the circumstances involved.

The Circuit Court of Appeals clearly overlooked the fact that the trustee's certificates, while subject to the lien of the lienor which existed at the time of the bankruptcy proceedings, nevertheless constituted a first lien on the citrus crop which was ripe and mature and which the lienor procured through getting the sale confirmed. In the petition for rehearing it was pointed out to the Circuit Court of Appeals, in the fourth ground thereof, that L. Maxcy, Inc., had no lien on this mature citrus crop and that these certificates should have been paid out of the proceeds of the crop. This procedure very evidently left the Court obligations outstanding and unpaid and enabled L. Maxcy, Inc. to procure the crop freed of the lien of the certificates. Moreover, as an equitable proposition a portion of the funds had been used for preservation expenses, and L. Maxcy, Inc., had never objected to the issuance of the certificates, although appearing in the proceedings throughout. It was unquestionably aware of the existence of the certificates at the time it had asked for confirmation and at the time it had made the deposit in the Registry of the Court to cover the costs of the proceedings.

The record will disclose that no testimony was offered by L. Maxcy, Inc., as against the petition of the Trustee setting up the services rendered.

It is pointed out by the District Judge in his Opinion (R. 108-111) that L. Maxcy, Inc., had no lien upon the citrus crop after the expiration of its contract. This holding was not disturbed by the Circuit Court of Appeals and is in accord with the Florida Law.

E. C. Fitz & Company v. *Eldridge*, 176 So. 539;

Summerlin v. *Orange Shores, Inc.*, 97 Fla. 996, 122 So. 508.

The Trustee's report shows that he had paid out some $764.00 for expenses in caring for the property which he was certainly entitled to have reimbursed. His report further shows that he had expended over $12,000.00 in cultivating, fertilizing and caring for the property for the three-year period. His petition clearly sets forth the services rendered in connection with the services of the officers of the court, including the referee, trustee and other expenses. Even under normal administration, the trustee and referee would have been entitled to the prescribed statutory fees for their services and under the facts set forth and under the authorities cited herein they were clearly entitled to be compensated for the benefits which accrued to the lienor.

In Volume 4, Remington on Bankruptcy, p. 2613, the rule is stated as follows:

> "Certainly Congress had the right to change the forum in which lienholders might realize upon their securities, even to the extent of excluding all other courts, if the bankruptcy court has possession, and no sound reason exists for making out of the bankruptcy court a charity court, in which lienholders can realize on their securities without the costs and expenses they would ordinarily be charged with in the State Courts, nor for making bankruptcy trustees work at their own risk of any pay whatsoever in marshaling liens on property in their possession and selling the property covered thereby."

This statement of Mr. Remington is borne out by the numerous holdings of the Supreme Court of the United States, including the case of *Adair* v. *Bank of America Nat. T. & Sav. Asso.*, 82 L. Ed. 889, 58 S. Ct. 594, 303 U. S. 350-362; *Wright* v. *Vinton Branch of the Mountain Trust Bank of Roanoke, Virginia, et al.*, 300 U. S. 440, 470, 81 L. Ed. 745, 57 S. Ct. 556, and numerous holdings of the Supreme Court emphasizing the fact that the bankruptcy court has para-

mount exclusive jurisdiction over the property of the bankrupt.

It is submitted that the Referee and District Judge endeavored to fix a reasonable amount to require the lienor to pay for the benefits received, and that the Circuit Court of Appeals clearly erred in arbitrarily fixing the sum of $500.00 against the findings and allowance made by the District Judge. The Trial Court findings should not have been disturbed since the findings are consistent with the evidence and the facts and circumstances

We submit that the Circuit Court of Appeals was not warranted in disregarding these findings:

Harkin v. *Brundage,* 276 U. S. 36, 53; 48 S. Ct. 268, 72 L. Ed. 457.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the proper construction of the National Bankruptcy Act may be had, settled and determined; that conflicts mentioned herein may be settled amicably and that the practice and jurisdiction of the Circuit Courts of Appeals may be more clearly defined, and that to such ends, a writ of certiorari should be granted, and this Court should review the decision of the Circuit Court of Appeals and finally reverse it.

Dated at Orlando, Florida, this 10th day of July, A. D. 1941.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1941

No. 263

C. D. WALKER, AS TRUSTEE IN BANKRUPTCY OF THE BANKRUPT ESTATE OF LAKE NURSERY COMPANY, A BANKRUPT, *Petitioners,*

VS.

L. MAXCY, INC., A FLORIDA CORPORATION.

BRIEF OF RESPONDENT, L. MAXCY, INC., IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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KEY TO ABBREVIATIONS

(R.) means the *incomplete Record* filed with the pending application for certiorari.

(F. R.) means the Records filed with former applications, *which are essential to an understanding of the case.*

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BRIEF OF RESPONDENT, L. MAXCY, INC., IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The Trustee in Bankruptcy of the Lake Nursery Company seeks a review by certiorari of the judgment of the Circuit Court of Appeals of the Fifth Circuit handed down May 2, 1941 (*L. Maxcy, Inc., vs. Walker,* 119 Fed. (2d) 535), reversing a judgment of the District Court for the Southern District of Florida, which assessed a mortgagee who purchased property at a sale by the Trustee free of liens $5,500 as a contribution toward the cost of the sale.

For brevity we shall refer to the parties involved herein as follows: "Trustee" means C. D. Walker, as Trustee in Bankruptcy, the petitioner in this cause; "Maxcy" means L. Maxcy, Inc., a Florida corporation, the respondent herein.

A CONCISE STATEMENT OF THE CASE

Trustee's counsel in their brief refer to and adopt as their "statement of the case" the "summary statement of the matter involved" in their petition for writ of certiorari. This statement is deficient and misleading in several important respects:

It makes prominent at the outset the claim of the Trustee for ". . . the costs of preservation" of the property involved and the argument stresses the right of the Trustee to recover therefor, but fails to state that this claim went out of the case on April 22d, 1940, when the District Judge struck it from the Referee's order of allowance by his "memorandum" (R. 108) and by his order of that date (R. 107) from which no appeal was taken by either side. It was from the judgment of August 20, 1940, entered upon review of the Referee's subsequent order that the case was carried to the Circuit Court of Appeals (R. 122-123).

The next important omission is that District Judge Akerman was out of Florida at his summer home in North Carolina continuously from the date the petition for review was filed until he came to Jacksonville and heard arguments on August 5, 1940, and, under the prevailing practice in the District, other judges thereof would not have heard the petition for review, since it related to a complicated matter which only Judge Akerman had handled and which was pending in the Orlando Division, over which he presided (R. 120-121). Hence, it was impossible to have called the petition for review up for hearing within

twenty days from the filing of the certificate of review by the Referee.

It is next stated that the District Judge ". . . entered an order granting the said motion to dismiss." An examination of Judge Akerman's opinion and order (R. 122-123) shows, on the contrary, that *the Judge considered and affirmed the Referee's order upon its merits* and that he did not dismiss the petition for review.

It should have been stated also that the property did not sell for enough to pay the lien held by Maxcy; that the Bankrupt had no other asset; and, that the only income of the Trustee was the proceeds of fruit from the encumbered property, from which he had received during his three years of possession $15,-820.08 (R. 36), out of which he had expended upon the property a total of only $9,776, consisting of the following items: Fertilizers $5,737.32, Wages $1,-305.50, Spraying materials $1,969.09, Cultivation $733.42, Repairs to house $30.67 (R. 36-38). The balance of the income, less $78.90 which the Trustee had on hand at the time of making his report, had been expended, together with certain sums borrowed, in unsuccessfully contesting Maxcy's lien. (See the opinion of Judge Akerman, R. 108, and the opinions of the Circuit Court of Appeals cited on page five hereof.)

It is also stated that Maxcy moved the Court to confirm the sale of the property to it, etc., and again that Maxcy availed itself of the sale free of liens so made by the Trustee. The important fact should

have been added that the sale so made by the Trustee was ". . . over the protest of . . . L. Maxcy, Inc., which Company held a mortgage on the property of $61,685.24." (See opinion of Judge Foster, 119 Fed. (2d) 535.)

DIMINUTION OF RECORD

Maxcy's opposition to the sale is not truly reflected by the partial record filed in this Court with the petition on July 12, 1941. On page 124 of that record will be found a stipulation by counsel for the respective parties in the Circuit Court of Appeals to the effect that the printed records in two former appeals to that Court, to-wit, Volumes I, II and III in case number 8414, and Volume IV in cause number 9003, "may be considered as a part of the record in this appeal if, and as far as, pertinent and applicable to any issue involved in this cause." That stipulation was observed by the Circuit Court of Appeals. Those records were brought to this Court in two former applications for writs of certiorari, and unless this Court now considers them, the record is too meager for intelligent action. Therefore, in this brief we shall be obliged to cite said other records and since the pages therein are numbered consecutively in the four volumes, we shall use only designation "F. R.," which means former record.

ARGUMENT

We perceive no ground upon which this Court should grant certiorari. Certainly the case does not

fall within the category specified in Rule 38 of this Court.

For brevity we shall follow and answer *seriatim* the argument, pages 16-29 of the Trustee's brief, which lists and argues grounds "A" to "F," inclusive.

"A. May a party litigant ignore a local rule of the District Court which provides that all petitions for review of a Referee's order in Bankruptcy shall be called up by the petitioner for hearing before the Judge within twenty (20) days from the filing of the certificate of review by the Referee," etc.

This case has been to the Circuit Court of Appeals twice (*Florida Fruit Canneries, Inc., vs. C. D. Walker, as Trustee*, 90 F. (2d) 753; *C. D. Walker, as Trustee, vs. L. Maxcy, Inc.*, 103 F. (2d) 24), and from each decision of that Court in favor of Maxcy, certiorari was unsuccessfully sought of this Court. The particular phase of the case then involved, to-wit, what amount Maxcy should contribute toward paying the expenses of the sale in bankruptcy free of liens, had been previously reviewed by District Judge Akerman, who had remanded the cause to the Referee with directions (R. 107-108), and Judge Akerman was absent from the State of Florida at his summer home in North Carolina continuously from before the petition for review was filed until after the Trustee moved to dismiss the case. Hence, it could not be called up before Judge Akerman and would not be considered by any other judge of the District (R. 120). Moreover, when Judge Akerman returned to the District, he passed upon the merits

of the Referee's order and did not dismiss the petition for a review of said order (R. 122), and, the Circuit Court of Appeals reviewed the decree of Judge Akerman upon the merits of the case (119 F. (2d) 535), notwithstanding all which this Court is asked to say that under District Court Rule 22 it was the imperative duty of the District Judge to have dismissed the case and of the Circuit Court of Appeals to have treated it as dismissed.

This Court in *United States vs. Gotlieb Breitling,* 20 Howard 252-255, 15 L. Ed. 900, said:

> *"And it is always in the power of the Court to suspend its own rules or to except a particular case from its operation whenever the purposes of justice require it."*

Of course, a contrary rule has often been expressed with respect to rules prescribed by superior courts for the government of inferior courts, but a court may waive its own rule, and should do so, when justice requires it, and the Circuit Court of Appeals promptly so ruled from the Bench when opposing counsel made the argument there that it now urges before this Court. Furthermore, the rule did not apply when the Judge was out of the State, because it was impossible to call the case up for hearing. (*In re Hopkins,* 15 F. (2d) 206.)

The cases cited in the Trustee's brief are not in point and do not sustain his contention. That of *Williamson vs. Leith, et al.,* (C.C.A. 5) 36 F. (2d) 643 involved an entirely different situation. The petition for review in that case was not called up for more

than a year, and in the meantime the Trustee, assuming that the petition had been abandoned, had disposed of the property. The Appellate Court held that he was justified in so doing and that it was error for the District Court under the circumstances to have made an order affecting the property without determining if the Trustee still had it in his custody. The opinion expressly concedes that the District Court had power to waive its rule. Each of the other cases cited involved the requirement that the petition for review must be filed within ten days from the date of the Referee's order. In none of the cited cases did the District Court waive its rule, but in numerous other cases that rule has been waived even after the time had expired. See *Thummess vs. Von Hoffman* (C.C.A. 3) 109 F. (2d) 291, and numerous cases cited therein. Moreover, being an administrative order, the District Court had the power to review it *sua sponte* at any time before settlement of the Trustee's accounts. *In re Stillwell, et al.* (C.C.A. 6) 12 F. (2d) 205.

"B. Where a lienholder avails itself of the benefits of a sale free and clear of liens . . . should the lienholder be required to pay the reasonable costs of the proceedings had for the sale," etc.

We have mentioned that Maxcy opposed the sale. The opinion of the Circuit Court of Appeals points out the same fact, saying that the sale was made ". . . over the protest of appellant, L. Maxcy, Inc." Maxcy's opposition is made to appear over and over again in the record. Its answer to the petition of the Trustee for leave to sell averred that the property

contained no equity for the unsecured creditors, and said:

> ". . . and that in truth and in fact the property cannot be sold for an amount sufficient to pay even the debt due this respondent. However, if this Honorable Court does find that there is equity in favor of the Creditors, and that the property should be sold, then that this respondent should be protected against any costs to be taxed in this cause; and that the costs of the said sale and all matters incident thereto should be paid by the Trustee in Bankruptcy, and not taken from the proceeds of any sale, unless the property should sell for sufficient to satisfy respondent's claim." (F. R. 9003, pp. 1298-9.)

The answer prays:

> "That in the event this Honorable Court shall find that there is no equity in the property in favor of the creditors, that the Trustee in Bankruptcy turn over and deliver the same to this respondent, and require the Trustee to account for any moneys which may have come into his hands." (F. R. 9003, p. 1300.)

Passing upon similar pleadings, the Court *in re Bruce Sewing Machine Company,* 2 F. Supp. 330, said:

> "Respondent answered. It asserted its rights in the premises and at the conclusion consented to the sale by the trustee, upon condition, if the real estate shall not bring a sum in excess of defendant's debt, interest, and costs, 'this defendant be permitted to purchase said real estate at said sale for the amount of

> said debt, interest and costs, surrendering its lien in payment of the purchase price.' In effect, the bank said, it did not believe the trustee in bankruptcy had any interest in the property, but, if he thought he could get something out of it over and above what was due the bank, the interest and costs, he was at liberty to do so at his own hazard. It stood squarely upon its legal rights within the provisions of section 67d of the Bankruptcy Act and assumed no additional obligation."

Even before, namely, in its answer to the plenary suit brought against it by the Trustee, it sought leave to foreclose its mortgage in the State Court, but was denied that privilege by order of the District Court (F. R. 179-184, Par. 9).

The petition of the Trustee for leave to sell free of liens was filed on the 16th of December, 1937 (F. R. 1281). In that petition he says:

> "He is desirous of immediately disposing of all property of the bankrupt corporation and in order to do so most advantageously in the interest of the creditors of said bankrupt, both secured and unsecured, does verily believe that all property should be sold free and clear of all liens, judgments and mortgages."

This petition was granted by order of the Referee dated February 24, 1938, but the Trustee delayed selling, and on May 12, 1939, Maxcy filed a petition with the Referee setting forth the delay and the facts in reference thereto (R. 24-28) and other facts showing how Maxcy was being injured, and concluded by calling attention of the Court to the fact that Maxcy

had opposed the sale throughout, but since the Court had ordered that the property be sold free of liens, Maxcy prayed that the sale be promptly made so as to save it further and continuous injury resulting from the delay. Maxcy's position was that of a condemned man who prayed for speedy execution of the sentence inasmuch as there was no escape. He no more consented to the sale than the supposed prisoner consented under such circumstances to his own execution. This fact makes a vast difference, because under the law if a lien holder invites the sale of his property by a Court of Bankruptcy free of liens, he may be charged with costs, even though there is no general estate out of which the costs can be paid, but the contrary is true where the sale is made over the lien holder's protest and the property does not bring enough to pay the lien, because Section 68, Sub-section d of the Bankruptcy Act, 11 U.S.C.A., Section 107, Sub-section d, expressly provides that

> "Liens given or accepted in good faith . . . shall . . . not be affected" by bankruptcy.
>
> "It was the purpose of Congress in enacting a national insolvency law to preserve, rather than destroy, any of the rights or advantages enjoyed by creditors under the laws of the states, save to the extent that they are repugnant to or inconsistent with the specific provision of the bankruptcy law." *Schexnailder v. Fontenot, et al.*, 85 So. 207.
>
> "All obligations of legal and equitable nature, except those expressly affected by terms of bankruptcy act, remain undisturbed by bankruptcy." *Wilson et al. v. Duncan,* C.C.A. 5, 61 Fed (2) 515.

It seems obvious that to take a large sum of money from a lien holder under the guise of charging him with the cost of selling the property free of lien deprives him of his security as effectively as if the taking had assumed any other form. In each of the cases cited by the Trustee the creditor had invoked, or agreed to, the sale of the property upon which he had a lien, and, hence, they do not apply in this case, where the sale was opposed by the lien holder.

"C." Under this heading it is contended that the Trustee and Referee were entitled in any event to be paid their statutory fees out of the proceeds of the property. The first and main case cited and relied upon by counsel (*In re: Huggins Co.,* 179 Fed. 490—should be *In re: Harralson*) holds exactly to the contrary. The second and only other case cited (*Varney v. Harlow,* C.C.A. 4, 210 Fed. 824) did not involve the question before this Court. In that case the bondholders not only consented to the sale by the Trustee free of lien, but petitioned that it be made, and the Court found that the decree of sale was drafted to meet the bondholders' convenience. Hence, the real question there decided was whether the Trustee was entitled to a commission from the purchase money on the amount constructively disbursed by him to the lien holder.

Of course, the Trustee and Referee are entitled to their commissions if there is a general fund out of which they can be paid, but they are not so entitled when the only asset is encumbered, and it, when sold against the will and over the protest of the lien holder, fails to bring enough to pay the lien. Any other rule

would not only violate the statute (Bankruptcy Act, Section 67, Sub-section d, 11 U.S.C.A., Section 107, Sub-section d), but would tempt officers to sell encumbered properties when there was no reasonable prospect of thereby producing a surplus for the benefit of the bankrupt estate.

In *Louisville Joint Stock Land Bank vs. Radford,* 295 U.S. 555, 55 S. Ct. 854, this Court said:

> "Sale free of liens will not be ordered by bankruptcy court if it appears that amount of incumbrance exceeds value of property to be sold; and in case of sale free of liens for less than amount of lien, bankrupt estate must bear costs of sale."

Where there are no other assets and the property does not bring enough to pay the lien and the sale was not made for the benefit of the encumbered property or at the request of the lien holder, the rule is that such expenses of the sale as would not exceed the cost to foreclose in the State Court are chargeable against the proceeds. In addition to the cases heretofore cited see *Robinson vs. Dickey,* C.C.A. 3, 36 Fed. (2) 147; *Aetna Life Insurance Co. vs. Leonard, et al.,* 186 Fed. 148; *Seaboard National Bank vs. Rogers Milk Products Co., et al.,* C.C.A. 2, 21 Fed. (2) 414; *In re: West,* 232 Fed. 903; *In re: Ford's Wawbeek Springs, Inc.,* 7 Fed. (2) 959. And as pointed out by the Circuit Court of Appeals in the case now sought to be reviewed, such taxable cost "does not include hypothetical attorneys' fees where there has been no foreclosure, nor does it include the Referee's commission or the Trustee's compensation

measured by the amount the property may bring." (119 Fed. (2) 536, Column 1.) On the contrary, the amount assessable cannot exceed the statutory fees allowed in the particular state for officers conducting a sale under state foreclosure proceedings, and no attorney's fee can be allowed because there was, in fact, no foreclosure and such fee would be wholly hypothetical.

"D." Under this heading the brief discusses the amount allowable under the Bankruptcy Act to Trustees and Referees, but we have shown that the allowances provided by the Bankruptcy Act are not applicable under the facts of this case.

"E." Under this heading it is contended that Maxcy ought to have been required to contribute toward "the costs and expenses incident to the preservation and liquidation of the security involved."

District Judge Akerman answered that contention in his "Memorandum" of April 22, 1940, in the following language:

> ". . . nor do I have any doubt that in a proper case the property covered by the lien should be charged with the expenses of preserving the property. However, it appears from the Trustee's report that while this property was in the hands of the Trustee large sums of money were obtained from the sale of the fruit produced thereon, which sums of money were very largely expended in the payment of attorneys' fees and expenses of costly and unsuccessful litigation between the Trustee and L. Maxcy, Inc., and I do not think it is consistent with the

> prinicipies of equity to expend the income derived from property in the hands of the Trustee in unsuccessfully fighting the holder of a lien, and then undertake to charge the holder of such lien with the expenses of preserving the property." (R. 109)

The order of the Court remanded the cause to the Referee "for further proceedings in accordance with the views expressed in said opinion." (R. 107-8.) No appeal was taken from that order, and the Referee in his next finding, in obedience to the order, reduced the sum which he had commanded Maxcy to pay from $8,953.00 to $5,500.00 (R. 113). It was from the decree of Judge Akerman (R. 122) affirming the second order of the Referee that the appeal was taken to the Circuit Court of Appeals, whose opinion this Court is now asked to review. Hence, question of assessing Maxcy a sum for the preservation of the property was not before the Circuit Court of Appeals and is not before this Court. Moreover, any such charge would have been manifestly inequitable for the reasons pointed out by Judge Akerman.

"F." It is next argued that $5,500.00 was a reasonable amount "to require the security holder to pay where the property involved consists of a citrus grove which required constant care and expense for its preservation," etc. What we have said under the previous heading "E" is a complete answer to this claim. Moreover, the Trustee's report, as we have pointed out, shows that he took several thousand dollars more from the property than he expended upon it; that he kept the property from Maxcy for three years without offering it for sale, and finally it sold

for many thousand dollars less than the amount of the encumbrances Maxcy had. The fault lies at the door of the Trustee and Referee. The Court *In re: West,* 232 Fed. 903 pertinently points out that in a case where the bankrupt's property was sold by the Trustee free of lien "solely with the view of realizing for the general creditors and not for the benefit of the lien holder," there is no reason why the expense of the sale should be charged to the lien holders if they did not consent thereto. The same view was expressed in *In re: Ford's Wawbeek Springs, Inc.,* 7 Fed. (2) 959, where the Court speaking of the Trustee's claim for compensation said:

> "In other words, having incurred expenses in the hope of realizing something for creditors, and having failed in his endeavors, he now suggests that a secured creditor pay these expenses out of his security . . . moreover, it is clear, from facts that were before the Referee in the bankruptcy proceeding, that the activities of the Trustee were prompted more by the hope of invalidating the security of the mortgage than by any hope or expectation of realizing any surplus for creditors over and above the mortgage. In this attempt the Trustee was not successful."

So the Court denied him and his counsel compensation. The situation there described fits the case at Bar.

One other point we would urge is, that the claim for attorney's fees cannot be allowed as costs, as costs have never been held to embrace attorney's fees.

In this case there was no foreclosure, but counsel took the position that they could force a sale of the property and recover attorney's fees commensurate with foreclosure proceedings. There is no rule that would authorize such procedure.

Another case we would call especial attention to is *Virginia Securities Corporation vs. Partick Orchards, Inc.,* 20 Fed. (2nd) 78, (C.C.A. 4th Cir.). It is the suggestion of counsel that the present is in conflict with other decisions of the Circuit Courts of Appeal on the question, and that case is cited to sustain it.

Again, we call attention to the fact that in that case the mortgage creditor voluntarily chose to avail himself of the administrative functions of the Court in Bankruptcy to realize on his security.

The rule is summed up in the 5th headnote as follows:

> "Where there was no general fund in bankrupt estate, and expense of foreclosure and administration was incurred wholly for benefit and advantage of mortgaged property, such expenditure was properly chargeable against it, particularly where mortgage or lien creditor voluntarily sought to avail himself of administrative functions of court to realize on his security."

As already pointed out, Maxcy did not seek the aid of the Court, but protested the sale by the Trustee at every step, and to argue that because he requested the Court to enforce the order to sell the

property made February 24, 1938, so as to get the property away from the Trustee, who had practically abandoned it (F. R. 26), is an effort to avail itself of the administrative function of the Court in bankruptcy to realize on its security, is not short of begging the question.

Nor is the contention of counsel that because a motion was filed to confirm the sale waived the prior objections entitled to consideration. The property had been sold, but was still in the hands of the Trustee, who was neglecting it, and there was nothing left but for Maxcy to ask the Court to confirm that sale, so that it could get possession of the property to prevent a total loss.

CONCLUSION

We respectfully submit that the nature of this case precludes the review thereof by this Court and that the decision of the Circuit Court of Appeals is manifestly in accord with the statute and with the equities of the case, wherefore the petition for writ of certiorari ought to be denied.

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